

**Letter of Findings: 04-20130472**  
**Gross Retail Tax**  
**For the Years 2009 and 2010**

**NOTICE:** Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

**ISSUE**

**I. Telephone Equipment – Gross Retail Tax.**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-2(a); IC § 6-2.5-3-2(b); IC § 6-2.5-9-3; IC § 6-8.1-5-1(c); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 2.2-4-22](#); [45 IAC 2.2-4-22](#)(d); Sales Tax Information Bulletin 60 (July 2006).

Taxpayer argues that it was not required to pay or collect sales tax on the cost of telephone equipment which it installed pursuant to a time-and-materials contract.

**STATEMENT OF FACTS**

Taxpayer is an out-of-state business which installs voice and data equipment. Taxpayer contracted with the owner of a hotel for the installation of equipment pursuant to a time-and-materials contract.

The Department of Revenue ("Department") conducted an audit review of Taxpayer's business records. The Department assessed Taxpayer sales tax on the price of equipment which it installed.

Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results. Additional facts will be supplied as required.

**I. Telephone Equipment – Gross Retail Tax.**

**DISCUSSION**

Taxpayer installed data and telephone equipment for an Indiana customer. The Department's audit found that Taxpayer should have collected sales tax from the customer because the equipment was installed pursuant to a time-and-materials contract.

Taxpayer disagrees stating that it was told that the customer's prime contractor – not Taxpayer – either paid or was responsible for paying the tax.

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-3-2(a). A retail merchant – such as Taxpayer – is required to "collect the tax as agent for the state." IC § 6-2.5-2-1(b). The retail merchant "holds those taxes in trust for the state and is personally liable for the payment of those taxes . . . ." IC § 6-2.5-9-3. A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2.

The audit assessed sales tax on what it categorized as "time and material" contracts pursuant to [45 IAC 2.2-4-22](#).

[45 IAC 2.2-4-22](#)(d) provides in part:

Disposition subject to the state gross retail tax. A contractor-retail merchant has the responsibility to collect the state gross retail tax and to remit such tax to the Department of Revenue whenever he disposes of any construction material in the following manner:

- (1) Time and material contract. He converts the construction material into realty on land he does not own and states separately the cost for the construction materials and the cost for the labor and other charges (only the gross proceeds from the sale of the construction material are subject to tax);

As explained in Sales Tax Information Bulletin 60 (July 2006) (20060823 Ind. Reg. 045060287 NRA), "If a construction contractor purchases construction materials pursuant to a time and material contract, the construction contractor is a retail merchant and may purchase the construction material exempt from sales tax but must collect sales tax on the resale of the construction material and remit the sales tax."

Nonetheless, Taxpayer maintains it was relieved of paying or collecting the tax because it had been told that the customer's prime contractor – and not Taxpayer as the sub-contractor – was responsible for the tax. In addition, Taxpayer argues that the Department's audit had confirmed this argument and that the first draft of the "Audit Summary" did not assess Taxpayer the tax which is the subject of this protest.

At the outset it should be noted that it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Indiana Dep't of

State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Despite Taxpayer's argument to the contrary, [45 IAC 2.2-4-22](#)(d) plainly places responsibility on the Taxpayer to "collect the state gross retail tax and to remit such tax to the Department of Revenue . . . ."

The Department does not question Taxpayer's apparent good faith belief that the prime contractor would pay the tax, but the law places responsibility for this tax squarely on Taxpayer.

Taxpayer has not met its burden of establishing the assessment was wrong.

**FINDING**

Taxpayer's protest is respectfully denied.

*Posted: 12/25/2013 by Legislative Services Agency*

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